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OF DEATH PENALTY CASES

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STARTING FROM SCRATCH: RETHINKING FEDERAL HABEAS REVIEW OF DEATH PENALTY CASES

JOSEPH L. HOFFMANN*

I. INTRODUCTION

IT has been a remarkable thirty-year run for federal habeas corpus. From 1963, when the United States Supreme Court expanded the availability of habeas relief in *Fay v. Noia*,¹ *Townsend v. Sain*,² and *Sanders v. United States*,³ to the present day, federal habeas review of state convictions has played a major role in the American criminal justice system. Federal habeas courts have served as enforcers of federal constitutional rules against recalcitrant or uninformed state officials⁴ and as vindicators of federal constitutional rights of state prisoners.⁵ They also have engaged in a vigorous, ongoing dialogue with the state courts over the meaning of federal constitutional provisions.⁶ In fact, federal habeas has had such a significant impact on the administration of criminal justice in the states, both directly (by

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I would like to thank Craig Bradley, Larry Kramer, Jim Liebman, Lauren Robel, Bill Stuntz, and the faculty and students at Florida State University College of Law who invited me to participate in the excellent symposium for which this Article was written. I take sole responsibility for the views expressed in this Article and for any mistakes that may appear.

1. 372 U.S. 391 (1963).

2. 372 U.S. 293 (1963).

3. 373 U.S. 1 (1963).

4. See *Teague v. Lane*, 489 U.S. 288, 307 (1989); *Mackey v. United States*, 401 U.S. 667, 687 (1971) (Harlan, J., dissenting and concurring in the judgment) (federal habeas ensures that state judges will "toe the constitutional mark").

5. See *Fay v. Noia*, 372 U.S. 391, 401-02 (1963) ("function [of federal habeas] has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints"); *id.* at 402 (federal habeas provides "a mode for the redress of denials of due process of law").

I have previously argued that before 1963 the competing "deterrence" and "vindication of federal rights" theories of federal habeas were practically inseparable. Until the Court's decision in *Fay v. Noia*, which first authorized federal habeas courts to hear issues that had not previously been presented to the state courts, a denial of a defendant's federal rights would always have meant that the state courts deserved to be deterred. See Joseph L. Hoffmann, *The Supreme Court's New Vision of Federal Habeas Corpus for State Prisoners*, 1989 SUP. CT. REV. 165, 178-80.

6. See Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977).

reversing state convictions) and indirectly (by furthering the development of federal constitutional law), that it has become a prime target of states' rights advocates who have questioned whether habeas should be allowed to continue to exist in its current form.⁷

As important as federal habeas has been to the American criminal justice system in general, it has been even more important in the special context of death penalty cases. Because of the unusually complex federal constitutional framework that the Supreme Court has developed since the mid-1970s to govern the administration of justice in capital cases,⁸ combined with the traditional reluctance of state appellate courts to reverse death sentences,⁹ federal habeas has become the primary battlefield upon which the fate of most death row inmates is decided.¹⁰ Although federal habeas is not primarily to blame for the lengthy delays between the imposition of a typical death sentence and its implementation,¹¹ those who toil regularly in capital litigation will readily admit the focus in most cases has been on the federal habeas courts: often that is where a capital defendant's best hope for relief lies.

Now, however, we may be nearing the end of an era. Dramatic changes have occurred in habeas law, and more changes are likely to occur soon. Over the past fifteen years, the Supreme Court has cut back gradually on the general availability of habeas relief.¹² Through

7. See, e.g., Sandra D. O'Connor, *Trends in the Relationship Between the Federal and State Courts From the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801, 814-15 (1981) (article by Justice O'Connor that was written while she was still a state judge).

For an excellent general treatment of the law of federal habeas, see JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* (1988); JAMES S. LIEBMAN & STEVEN M. GOLDSTEIN, 1991 CUMULATIVE SUPPLEMENT (1991).

8. Most of this complicated framework has resulted from the Court's ongoing efforts to reconcile the demand for rationality and predictability in death sentencing, see *Gregg v. Georgia*, 428 U.S. 153 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972), with the need for an individualized consideration of the crime and criminal, see *Lockett v. Ohio*, 438 U.S. 586 (1978); *Woodson v. North Carolina*, 428 U.S. 280 (1976). For a recent analysis of the extent of the conflict between these two lines of cases, see Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147 (1991).

9. See Richard J. Bonnie, *Preserving Justice in Capital Cases While Streamlining the Process of Collateral Review*, 23 U. TOL. L. REV. 99, 105, 109 (1991).

10. See William S. Geimer, *Law and Reality in the Capital Penalty Trial*, 18 N.Y.U. REV. L. & SOC. CHANGE 273, 274 (1990-91).

11. See Karen M. Allen et al., *Federal Habeas Corpus and Its Reform: An Empirical Analysis*, 13 RUTGERS L.J. 675 (1982); Michael Mello, *On Metaphors, Mirrors, and Murders: Theodore Bundy and the Rule of Law*, 18 N.Y.U. REV. L. & SOC. CHANGE 887, 894-918 (1990-91).

12. The Court has long viewed itself as having the authority to alter the scope of federal habeas, even without new legislation. See *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977) (referring to the "Court's historic willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged").

decisions dealing with procedural default,¹³ exhaustion,¹⁴ and abuse of the writ through the filing of successive habeas petitions,¹⁵ the Court has made it increasingly difficult for habeas courts to reach the merits of a prisoner's federal claims. Just three years ago, in the most significant of these decisions, the Court declared in *Teague v. Lane*¹⁶ that prisoners generally must base their habeas petitions on asserted violations of the federal law as it existed at the time of the original state proceedings. In a follow-up case, the Court held that if the federal law was unclear at that time, any reasonable, "good faith" interpretation of the federal law by the state courts would immunize the conviction from habeas attack.¹⁷ The Court recently added that if the state courts applied the federal law to the facts of a particular case in a manner consistent with the existing precedent at that time, then a subsequent Court ruling altering the proper manner of application of the federal law would not provide a basis for habeas relief.¹⁸

These decisions already have made it difficult for a prisoner to obtain review on the merits of more than one federal habeas petition.¹⁹ Now the other shoe is about to drop. Even as this Article goes to print, federal habeas as we have known it for thirty years may no longer exist. The Supreme Court and Congress are each considering whether to wipe out the last vestiges of vigorous, searching, nondeferential habeas review of state convictions. Such action would render habeas relief in death penalty cases extremely rare, even on first petitions. In Congress, an effort is under way to restrict habeas courts to reviewing only whether the state courts provided a "full and fair opportunity" for adjudication of a federal constitutional claim.²⁰ In the

13. See *id.*

14. See *Rose v. Lundy*, 455 U.S. 509 (1982).

15. See *McCleskey v. Zant*, 111 S. Ct. 1454 (1991).

16. 489 U.S. 288 (1989). The portion of Justice O'Connor's lead opinion in *Teague* referenced in the text garnered only three other votes and thus is technically only a plurality opinion. However, in the subsequent case of *Penry v. Lynaugh*, 492 U.S. 302 (1989), Justice O'Connor picked up the additional vote of Justice White, who refused to join the relevant portion of her opinion in *Teague*. Thus, the relevant portion of Justice O'Connor's opinion in *Teague* now represents the view of a majority of the Court.

17. See *Butler v. McKellar*, 494 U.S. 407 (1990).

18. See *Stringer v. Black*, 112 S. Ct. 1130 (1992).

19. See generally Geimer, *supra* note 10, at 274-78; Steven M. Goldstein, *Chipping Away at the Great Writ: Will Death Sentenced Federal Habeas Corpus Petitioners Be Able to Seek and Utilize Changes in the Law?*, 18 N.Y.U. REV. LAW & SOC. CHANGE 357 (1990-91); James S. Liebman, *More Than "Slightly Retro": The Rehnquist Court's Rout of Habeas Corpus Jurisdiction in Teague v. Lane*, 18 N.Y.U. REV. L. & SOC. CHANGE 537 (1990-91).

20. In July 1991, the Senate passed a crime bill that would have adopted the "full and fair adjudication" standard for federal habeas review of state convictions. S. 1241, 102d Cong., 1st Sess. (1991). Four months later, the House of Representatives passed a different version of the

Court, review was granted in two cases involving a similar issue: whether habeas courts must defer to prior state court adjudication of the merits of a federal constitutional claim.²¹ In one case, the Court failed to reach the standard of review issue in its decision.²² In the other case, briefing and oral argument are set for the fall of 1992.

As we seemingly approach the end of the era of expansive federal habeas review of state convictions, I think we must begin to engage in a frank and open-minded dialogue about the proper role of federal habeas in our criminal justice system. Federal habeas no longer means what it used to mean. Therefore, rather than tinkering with the old habeas of the past thirty years, we should rethink the basic principles that govern habeas policy and create a new habeas from the ashes of the old. It is time to try to reach a consensus on the proper nature of such a new habeas.

In this Article I have set out some of my thoughts on the proper role of federal habeas in death penalty cases. I propose we create two kinds of federal habeas—one for capital cases and the other for non-capital cases. Regardless of the scope and nature of habeas in non-capital cases, we should provide for one *true* habeas review *on the merits* in all capital cases. Such a habeas review should be based on existing federal law at the time of the relevant state proceeding, and subject to reasonable time limits, but free of the procedural default and exhaustion doctrines. Habeas courts should defer to state courts on factual issues, but not on legal or mixed issues. Any colorable claim of innocence, or legal ineligibility for the death penalty, should be cognizable on habeas. Finally, and with the sole exception of colorable claims of innocence or legal ineligibility, all federal habeas activity should cease one week before a scheduled execution, so the

crime bill, which would have omitted the "full and fair adjudication" standard. H.R. 3371, 102d Cong., 1st Sess. (1991). A conference committee approved a compromise version of the crime bill incorporating the House provisions on habeas. See H.R. Rep. No. 405, 102d Cong., 1st Sess. The compromise legislation cleared the House on November 27, 1991, but President Bush threatened a veto, in large part because of the decision of the conference committee to adopt the House provisions on habeas. See *Crime Bill Dies in Senate*, N.Y. TIMES, Nov. 28, 1991, at A1. The Senate has not acted on the compromise legislation and it now appears that the crime bill may not pass during this legislative session. However, this is the second year in a row that Congress has taken a hard look at the "full and fair adjudication" standard, and with continued Presidential support the issue likely will return to Congress next year. See generally Steven M. Goldstein, *Expediting the Federal Habeas Corpus Review Process in Capital Cases: An Examination of Recent Proposals*, 19 CAP. U. L. REV. 599 (1990) (discussing various legislative proposals to restrict federal habeas).

21. See *Wright v. West*, 931 F.2d 262 (4th Cir. 1991), cert. granted, 112 S. Ct. 2482 (1992); *Withrow v. Williams*, 944 F.2d 284 (6th Cir. 1991), cert. granted, 112 S. Ct. 1664 (1992) (No. 91-1030).

22. See *Wright*, 112 S. Ct. 2482.

prisoner can prepare for his fate without the distractions of the last-minute legal circus that now surrounds the execution process.

I intend to elaborate on these broad, general principles to guide the creation of a new habeas for death penalty cases. I have not yet worked out all the details and I do not purport to have all the answers. I have deliberately avoided all questions of implementation. Clearly, Congress would have to take significant action to create two kinds of federal habeas. It is less obvious what kind of specific statutory language would be appropriate and whether there is political support in Congress or at the White House for such a statute.²³ Nevertheless, I hope to contribute to the habeas policy debate by revisiting these ideas and putting them together into a single, coherent habeas scheme designed specifically for capital cases. As we await the next moves by the Court and Congress, which may well initiate a new era of federal habeas, we should start from scratch and rethink the arguments for and against federal habeas review of death penalty cases.

II. PUNISHMENT AND THE DEATH PENALTY

Before discussing the proper role of federal habeas in a death penalty system, however, I would like to explain briefly my views about punishment in general and the death penalty in particular. This is something academics who write about habeas and the death penalty almost never do. Perhaps this is because it is generally assumed that all academics are, or at least should be, fundamentally opposed to the death penalty on moral grounds. Perhaps it is because academics believe they can write objectively about habeas without regard to their views on the death penalty. However, I do not share such confidence, about myself or others.²⁴ I want to lay my cards on the table so my

23. These questions of implementation are, admittedly, extremely difficult and important and will require much work. But until we see exactly what the Court and Congress decide to do about the current habeas statute, it seems premature to think about proposing a specific new one. Moreover, at least one of my suggested principles, the imposition of reasonable time limits on filing habeas petitions, might require a constitutional amendment. See Michael Mello & Donna Duffy, *Suspending Justice: The Unconstitutionality of the Proposed Six-Month Time Limit on the Filing of Habeas Corpus Petitions by State Death Row Inmates*, 18 N.Y.U. REV. L. & SOC. CHANGE 451 (1990-91).

24. I regularly teach a death penalty seminar for law students at Indiana University. In my seminar I focus on the various legal doctrines developed by the Supreme Court under the Eighth Amendment, rather than on the moral and practical arguments for and against the death penalty itself. However, my students' views about these legal doctrines are often colored by their views about the death penalty. This tends to stifle productive debate. Therefore, at the start of each semester, I explicitly instruct my students to set aside their opinions about the morality of the death penalty, and to assume its continuing existence. Then we can proceed to talk about the

views about federal habeas may be interpreted in light of my views about the death penalty.²⁵

Over the past several years, I have become increasingly dissatisfied with the public debate about federal habeas and the death penalty. Listening to the opinions of commentators ranging from Chief Justice Rehnquist²⁶ and former Attorney General Thornburgh²⁷ to former Justice Brennan²⁸ and *The Washington Post*,²⁹ I have found many of the arguments unacceptably strident and unyielding. Based on the absolutist tone, it often seems one side of the debate consists of those who adamantly oppose the death penalty, no matter what the crime and circumstances. They want to prolong the post-trial review process as long as possible in hopes of wearing out the opposition and preventing executions. It seems those on the other side of the debate want to see death imposed as often as possible, ideally for every murder (and even for some other crimes, such as drug dealing), with as little delay as possible between sentencing and execution.

These uncompromising positions seem strange to me. Perhaps it is natural that most of those who devote their time and energy to thinking about the effects of habeas on the death penalty will be committed to an extreme view on the morality of capital punishment. And perhaps it also is natural for these opponents gradually to cast each others' positions in radical terms as the policy debate becomes more and more heated. In this sense, the debate over habeas and the death penalty may resemble the debate over another controversial social issue of the day—abortion. However, as with abortion, I suspect the views of many Americans lie somewhere between the two extreme positions. And that is where my own views lie as well.

"lesser" legal issues that are the subject of the seminar. I find it necessary to remind my students of this instruction at least every two or three weeks during the semester, and I am not at all certain they are ever able to follow it.

My students instinctively understand that their views about the legal issues are strongly, and perhaps inevitably, influenced by their opinions about the morality of the death penalty itself. It is ironic that most academics who write about habeas and the death penalty seem to deny, or at least to ignore, this pervasive influence.

25. I do not mean to suggest that reform of federal habeas in general should be motivated by death penalty reform; on the contrary, I think it is unfortunate. It is the strength of the connection between federal habeas and the death penalty that suggests to me it would be better to have two separate versions of habeas: one for capital cases and another for noncapital cases. Then our views about the death penalty will not affect the scope of habeas in noncapital cases.

26. See Linda Greenhouse, *Rehnquist Urges Curb on Appeals of Death Penalty*, N.Y. TIMES, May 16, 1990, at A1.

27. Dick Thornburgh, *The House Crime Bill: Attorney General Thornburgh Responds*, WASH. POST, Sept. 23, 1990, at B6.

28. See *Penry v. Lynaugh*, 492 U.S. 302, 341 (1989) (Brennan, J., concurring in part and dissenting in part).

29. *Forget the Crime Bill*, WASH. POST, Sept. 28, 1990, at A26.

I start from a basic premise: punishment should be imposed because it is what the criminal deserves. This is the retributive theory of punishment articulated by Immanuel Kant³⁰ and, more recently, by Andrew von Hirsch,³¹ among others.³² I do not suggest that we should derive pleasure from imposing punishment, nor should we punish because to do so eases our anger or satisfies our desire for revenge.³³ Retributivism should not be based on emotions at all. Rather, it should be based on deeply shared societal views about justice and morality. We should punish simply because it is the right thing to do to someone who has committed a crime.

An important corollary is the theory of proportionality, meaning a criminal should be punished more severely if he deserves a more severe punishment, and vice versa.³⁴ The punishment should fit the crime. But moral responsibility depends on *both* the crime *and* the criminal. Two criminals who commit the same crime will not necessarily share the same moral responsibility for that crime: one may be far more responsible than the other.³⁵ Thus, it is better to say the punishment should fit the crime *and* the criminal.

What punishment should be available for the most heinous crimes and criminals? I believe that, in some cases, the death penalty is the only appropriate and deserved punishment. This is the most significant departure point between my moral views on punishment and the death penalty and what I suspect are the views of most academics.

The subject is not one that lends itself to rational argument or discourse, and I do not intend to try to persuade anyone who does not already agree with my position. I will only try to explain my views. I did not always believe the death penalty was an essential component of a retributive punishment scheme. But my study of capital cases over the past decade has left me with the conviction that *some* crimes committed by *some* criminals deserve death as a punishment. I am

30. See IMMANUEL KANT, *THE PHILOSOPHY OF LAW* (W. Hastie trans. 1887), reprinted in *PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT* 103 (Gertrude Ezorsky ed., 1972).

31. See ANDREW VON HIRSCH, *DOING JUSTICE* (1976).

32. For a brief discussion of the modern revival of retributivism, see ANDREW VON HIRSCH, *PAST OR FUTURE CRIMES* 3-12 (1985).

33. The distinction between so-called "protective retributivism," see Margaret Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1168-69 (1980), which focuses on the importance of treating the defendant as an autonomous moral actor, and "assaultive" or "channeling" retributivism, which focuses on the need to "channel" society's desire for vengeance, is often misunderstood by the courts. See Joseph L. Hoffmann, *On the Perils of Line-Drawing: Juveniles and the Death Penalty*, 40 HASTINGS L.J. 229, 247 n.117 (1989).

34. See Hoffmann, *supra* note 33, at 248-50.

35. See HYMAN GROSS, *A THEORY OF CRIMINAL JUSTICE* 74-88, 436-56 (1979) (discussing relationship between culpability, harm, and seriousness in retributive theory of punishment).

not talking about the classic felony murder, in which the presence of a "Saturday-night special" in the hands of a nervous defendant leads to the tragic but unintentional shooting of a convenience store clerk. Rather, I refer to crimes of exceptional brutality, committed by defendants who have an unmistakable desire to inflict pain and death on a helpless victim.³⁶ No alternative punishment—including life in prison—goes far enough to demonstrate society's abhorrence of the evil of the defendant's conduct in such cases. Any other sentence but death would be too lenient.³⁷

Would the world end if such defendants received a life sentence, rather than death, for their horrible crimes? No, but that would not make the imposition of a more lenient punishment just. Imposition of a life sentence in such extreme cases always would be settling for less than the defendant deserves.

However, I do not think death is an appropriate punishment for all, or even most, murders. Although all intentional murders are heinous and potentially warrant a death sentence, not all such murderers deserve to die. It is rare to find a murderer who comes from a loving and economically secure home; and when it does occur, we properly doubt such a person's sanity or mental capacity. Most murderers have suffered severe physical, emotional, and/or economic deprivation or mistreatment at some point in their lives. According to Professor William Geimer, "society is often partially responsible for the defendant's actions," because "individuals not on trial for their lives . . . abused, impaired, and failed [the defendant] at critical times."³⁸ This notion of "minimum shared responsibility"³⁹ leads me to agree with Professor Geimer that a murderer often can be less than completely morally responsible for his crime.

Because of this, I believe there are many murders for which the perpetrator does not deserve the death penalty. If the victim suffers a minimum of pain and the defendant is immature, retarded, influenced by a dominant accomplice, or the product of an abusive environment, then the death penalty may not be appropriate. Life in prison may satisfy the demands of retributive justice.

36. See, e.g., *McCorquodale v. State*, 211 S.E.2d 577 (Ga. 1974).

37. I recognize that many of today's prisons are plagued by overcrowding, lack of adequate resources, and the presence of predatory inmates who make it impossible for others to serve out their sentences peacefully. However, these problems are not inherent in the concept of imprisonment. They should be remedied wherever possible and should not be considered as part of a prisoner's prescribed punishment.

38. Geimer, *supra* note 10, at 294.

39. Geimer, *supra* note 10, at 294.

However, Professor Geimer believes "minimum shared responsibility" renders the death penalty "cruel and unusual" in all cases.⁴⁰ I do not agree with this assertion either as a matter of Eighth Amendment jurisprudence or as an inevitable moral truth. The problem is that Professor Geimer assumes capital punishment is deserved *only* when a defendant is completely morally responsible for his crime. I believe some murders are so heinous that much less than complete moral responsibility can still justify the death penalty. Again, this is not a topic that is conducive to rational discourse; nevertheless, it is a vital step in the process by which I reached the conclusion that a death sentence sometimes is justified.

I believe the death penalty should be available only for intentional murder and not for situations such as felony murder where the defendant did not intend or contemplate the use of lethal force.⁴¹ The death penalty should be reserved for intentional murders where death is facially proportional to the harm caused. There may be individual instances of other crimes, such as wartime espionage,⁴² rape,⁴³ or major drug-dealing,⁴⁴ where the harm caused may be as bad or worse than killing a person. But I would not extend the death penalty to such crimes. Given the odds against death as a proportional punishment for such crimes, the risk of moral error in allowing the death penalty is simply too great. I would ban the death penalty for such crimes until I am shown convincing proof the death penalty deters such behavior; such proof also might lead me to reconsider my sole reliance on the retributive justification for punishment.

40. "Capital defendants are rarely, if ever, solely accountable for their crimes, and certainly their accountability never reaches the point where society can justifiably require them to forfeit their lives." Geimer, *supra* note 10, at 295.

41. In this respect, I agree with the Supreme Court's decision in *Enmund v. Florida*, 458 U.S. 782 (1982). There, the Court held that the death penalty could not constitutionally be imposed against a felony murder defendant who did not "kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." *Id.* at 797. Later, in *Tison v. Arizona*, 481 U.S. 137 (1987), the Court expanded the category of death-eligible felony murder defendants to include those who act as a major participant in the felony and manifest a "reckless indifference to the value of human life." *Id.* at 157. I find the *Tison* result to be inconsistent with the principle of proportionality, especially since even the commission of an intentional murder does not automatically qualify a defendant for the death penalty; i.e., where the intentional murder does not implicate any of a particular state's statutory aggravating circumstances.

42. See Paul D. Kamenar, *Death Penalty Legislation for Espionage and Other Federal Crimes Is Unnecessary: It Just Needs a Little Re-Enforcement*, 24 WAKE FOREST L. REV. 881 (1989).

43. But see *Coker v. Georgia*, 433 U.S. 584 (1977) (death penalty for rape of an adult woman who survives violates Eighth Amendment).

44. See Sandra D. Acosta, *Imposing the Death Penalty Upon Drug Kingpins*, 27 HARV. J. ON LEGIS. 596 (1990).

Finally, there is the important issue of moving from an abstract, theoretical justification for the death penalty to the creation and maintenance of an actual death penalty system. Some critics point to the deficiencies of American society and of the criminal justice system as reasons to oppose capital punishment. These critics argue that we lack the "moral standing" to execute even deserving murderers because racism and other forms of discrimination are inherent in our justice system.⁴⁵

Others are concerned primarily with the possibility of error in the administration of the death penalty. For these critics it is intolerable that there is even the slightest risk an undeserving person may die. These critics therefore seek to abolish the death penalty in order to eliminate this risk.⁴⁶

Although I share these concerns, I only partially agree with the conclusions. I believe prosecutors, defense lawyers, judges, and juries generally try to do what is right within the confines of their roles in the criminal justice system.⁴⁷ We must certainly strive to eliminate racism and other forms of discrimination. But the continued existence of such knotty problems does not necessarily deprive society of the "moral standing" to do what is right in punishing crimes. Society should be able to impose the death penalty in appropriate cases.

45. See, e.g., STEPHEN NATHANSON, AN EYE FOR AN EYE? THE MORALITY OF PUNISHING BY DEATH 53 (1987).

Even if those who deserve to die ought to be executed, we ought not to allow the state to execute them if the procedures adopted by the state are unlikely to separate the deserving from the undeserving in a rational and just manner. History supports the view that the death penalty has been imposed on those who are less favored for reasons which have nothing to do with their crimes. The judgment that they deserved to die has often been the result of prejudice, and their executions were unjust for this reason.

46. See, e.g., Hugo A. Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987) (citing numerous examples of allegedly erroneous death sentences, and concluding: "Only one further major reform remains available: abolishing the death penalty entirely." *Id.* at 89). But see Hugo A. Bedau & Michael L. Radelet, *The Myth of Infallibility: A Reply to Markman & Cassell*, 41 STAN. L. REV. 161 (1988); Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121 (1988).

47. My work with the Capital Jury Project has given me a strong sense that jurors take their capital sentencing responsibilities very seriously. The project is a National Science Foundation-supported empirical research study involving thousands of interviews with jurors who have served in capital cases since 1988. I have listened to many of these jurors describe, in great detail, the extent to which they and their fellow jurors agonized over the intensely personal moral decision whether the defendant should live or die. These interviews have convinced me that our legal framework for capital sentencing may be largely irrelevant to what jurors actually do in such cases. However, I also am convinced jurors generally perform their capital sentencing duties with the utmost of care. Perhaps, as Justice Harlan seemed to suggest in *McGautha v. California*, 402 U.S. 183 (1971), that is the best for which we can hope.

I agree with the critics who claim our criminal justice system is not and cannot be perfect. Mistakes undoubtedly will be made, even with the extreme precautions now taken in death penalty cases. But I do not view perfection as a moral prerequisite to imposing the death penalty. The inevitability of human error does not force me to conclude that the death penalty must be abolished. We must do the best we can to avoid mistakes, but we should not allow ourselves to become paralyzed with fear and fail to live up to the moral principles that suggest that the death penalty is sometimes the most appropriate punishment for a particular defendant and crime.

III. FEDERAL HABEAS REVIEW OF DEATH PENALTY CASES

By far the most important aspect of any death penalty system is the method used to separate those cases where a death sentence is imposed from those where it is not. This is one of the most difficult tasks in all of the law. In *McGautha v. California*,⁴⁸ Justice Harlan, writing for a majority of the Supreme Court, provided a fitting description of the challenge posed by capital sentencing:

The States are entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision and will consider a variety of factors, many of which will have been suggested by the evidence or by the arguments of defense counsel. For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete. The infinite variety of cases and facets to each case would make general standards either meaningless "boiler-plate" or a statement of the obvious that no jury would need.⁴⁹

Because capital sentencing is an exceedingly difficult task—one that puts enormous psychological and emotional strains on the sentencer—a death penalty system should make it easier for the sentencer to make a morally correct decision about the appropriateness of the death penalty in a particular case. In other words, the top priority should be to separate a case where the death penalty is morally appropriate from one where it is not.

48. 402 U.S. 183 (1971).

49. *Id.* at 207-08; see also Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1613-15 (1986) (describing natural inhibitions against the infliction of pain and death on other people, and various ways in which the legal system manages to overcome such inhibitions in order to impose capital punishment).

This suggests that in a well-designed death penalty system most of the available resources should be focused on the original trial, including the sentencing hearing.⁵⁰ The system should do the best job possible to ensure that capital trial juries are properly selected;⁵¹ that state trial judges are well trained in the law of capital cases and properly sensitized to the concerns raised;⁵² and that the lawyers who handle capital trials, for both the State and the defendant, are well trained and provided with the necessary resources to adequately litigate the issues that may arise.⁵³

Sadly, most current death penalty systems do not even begin to approach this ideal. Instead, in most states both the capital trial and the direct appeal process are mere preludes to the main event: the collateral proceedings in the federal habeas courts.⁵⁴

This is a recipe for legal and moral disaster. It also is an incredible waste of society's resources⁵⁵ to put so little relative effort into capital trials and so much effort into the various state and federal proceedings that follow. When capital trials are tainted by serious error, only two things can happen—both unacceptable. One, the error is corrected in a post-trial forum, which usually means a new trial. This wastes all the resources that were devoted to the original trial and post-trial proceedings. Or two, the error is *not* corrected—for example, because the defense lawyer at the trial did not recognize it as error and thus did not properly preserve it for review.⁵⁶ This means either a legal cloud hangs over a deserved death sentence or, in the

50. See, e.g., Bonnie, *supra* note 9, at 107 ("State judicial systems can reduce the burdens of collateral review and assure the finality of adjudication by improving the quality of justice in capital cases and by taking special precautions to avoid constitutional error"); Geimer, *supra* note 10, at 278 (capital trials can serve as a "powerful vehicle for focusing a community's attention on the injustice of the death penalty").

51. See *Wainwright v. Witt*, 469 U.S. 412 (1985); *Witherspoon v. Illinois*, 391 U.S. 510 (1968), *overruled by* *Adams v. Texas*, 448 U.S. 38 (1980).

52. One of the most notable efforts that has been made in this regard is the National Judicial College's annual offering of a week-long course for state trial judges entitled "Handling Capital Cases." I have been a faculty member for the course since its inception in 1987 and I have taught more than 100 state trial judges about the federal law applicable to death penalty cases. Some states, such as Florida, offer similar educational programs for their own trial judges.

53. See Anthony Paduano & Clive A.S. Smith, *The Unconscionability of Sub-Minimum Wages Paid Appointed Counsel in Capital Cases*, 43 *RUTGERS L. REV.* 281 (1991); Bonnie, *supra* note 9, at 107-08.

54. See Bonnie, *supra* note 9, at 109 (state courts "seem to view state appeals simply as off-Broadway performances on the way to the federal courts").

55. See NATHANSON, *supra* note 45, at 33-41; Ronald J. Tabak & J. Mark Lane, *The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty*, 23 *LOV. L.A. L. REV.* 59 (1989).

56. See *Smith v. Murray*, 477 U.S. 527 (1986); *Murray v. Carrier*, 477 U.S. 478 (1986); *Wainwright v. Sykes*, 433 U.S. 72 (1977).

worst possible case, an undeserving defendant winds up on death row.

Although the capital trial should be the focus of attention, federal habeas still has an important role to play in a well-designed death penalty system. In fact, federal habeas review should serve not only as additional valuable insurance against trial error, but also as a method of improving capital trials—a goal that all of us should support, regardless of our views about the death penalty.

Many recent changes in habeas law, as well as the changes under consideration by the Court and Congress, have been motivated largely by a desire to extricate the federal courts from the states' administration of the death penalty.⁵⁷ Cases like that of Robert Alton Harris, who obtained four stays of execution from federal habeas courts during the last days before his execution in California this year (all of the stays were lifted by the U.S. Supreme Court),⁵⁸ have fueled the anti-habeas fire. Neither advocates nor opponents of the death penalty could have been pleased with the judicial tug-of-war that saw Harris removed from the gas chamber where he had already been strapped to the chair, only to be returned a few hours later and finally put to death. The Court's extraordinary final order barring any other court from granting another stay of execution to Harris evidenced a growing frustration with a habeas process that, at least in capital cases, seemingly has run amok.⁵⁹ With the Court about to de-

57. The current push for federal habeas reform dates back to 1989, when two distinguished committees began work on separate reports urging changes in habeas law as it applies to death penalty cases. One was the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, chaired by retired Justice Lewis F. Powell Jr. and known as the Powell Commission. It proposed several significant restrictions on the availability of habeas in capital cases conditioned on each state's agreement to provide qualified counsel in state post-conviction proceedings. See Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, *Report on Habeas Corpus in Capital Cases*, 45 CRIM. L. REP. (BNA) 3239 (Sept. 27, 1989). The other committee, the American Bar Association Task Force on Death Penalty Habeas Corpus, proposed less substantial changes in habeas law. These became the basis for the U.S. House of Representatives' provisions on habeas contained in the current crime bill, discussed *supra* at note 20. See AMERICAN BAR ASSOCIATION, *TOWARD A MORE JUST AND EFFECTIVE SYSTEM OF REVIEW IN STATE DEATH PENALTY CASES* (1990).

58. Leef Smith, *Murderer Meets Death Passively, Relatives of Harris and Victims Watch*, WASH. POST, Apr. 22, 1992, at A12.

59. On April 24, 1992, the Court issued a per curiam statement explaining its reasons for vacating the stay of execution for Robert Alton Harris. Harris claimed that his execution by lethal gas was cruel and unusual punishment in violation of the Eighth Amendment. However, the Court said his case represented an "obvious attempt" to avoid the application of *McCleskey v. Zant*, 111 S. Ct. 1454 (1991), in which the Court announced standards for applying the abuse of writ doctrine on successive petitions for federal habeas corpus relief. Thus, the Court felt it appropriate not only to vacate the stay of execution, but also to order that no further stays be issued by any other court. See *Gomez v. U.S. District Court for the Northern Dist. of California*, 112 S. Ct. 1653 (1992).

cide the future of federal habeas, the Harris situation could not have arisen at a worse time for habeas supporters.

It is unfortunate that in recent years the reform of federal habeas has been so closely linked to death penalty policy. In truth, the defects in the federal habeas process that are so visible and troubling in capital cases are, for the most part, either nonexistent or unimportant in noncapital cases.

For instance, probably the biggest problem with habeas in capital cases is the absence of a time limit for filing a habeas petition. But this is a problem primarily because of the unique situation a death row inmate faces. Unlike other inmates, prisoners on death row generally are willing to spend the rest of their lives in prison, given the alternative. Therefore, these prisoners have little incentive to file a habeas petition containing a potentially meritorious claim (or at least one that would require substantial judicial time and effort to resolve) until forced to do so to gain a stay of a scheduled execution. This leads to the now-familiar cycle of execution dates and stays that is the hallmark of capital litigation: the State sets an execution date, even if it knows that the execution will not actually take place, because this is the only way to make the prisoner use up his federal claims by filing a habeas petition and requesting a stay. After the petition is filed, the habeas court grants a stay so it will have sufficient time to resolve the claims. If the court rejects the claims, the State sets another execution date, and the cycle resumes.⁶⁰ The cycle ends only when the habeas court finally becomes confident enough, or angry enough, to reject a habeas petition without first granting a stay.⁶¹

The same cycle does not occur in noncapital cases. For a defendant who receives a prison sentence, the habeas clock begins ticking from the moment he begins to serve his sentence. He has a strong incentive to seek review of all potentially meritorious federal claims as quickly as possible, because his goal is to get out of prison. There is no need for the State, or anyone else, to provide an additional reason for a noncapital inmate to seek prompt federal habeas relief.

Given these differences between capital and noncapital cases, I think we should begin to think about the possibility of creating two kinds of federal habeas—one for capital cases and another for noncapital cases. This may seem like a radical idea. But if “death is dif-

60. See Hoffmann, *supra* note 5, at 187-90.

61. See *Barefoot v. Estelle*, 463 U.S. 880 (1983) (allowing federal courts to resolve merits of habeas petition in course of deciding motion for stay of execution).

ferent," as the Supreme Court has told us,⁶² then capital cases deserve different federal habeas treatment, just as they generally do in substantive and procedural law under the Eighth Amendment.

What would such a special habeas for capital cases look like? In my view, the following list of nine basic principles defines the proper role of habeas in a death penalty system.

1. There should be an opportunity for meaningful federal habeas review in all death penalty cases.

Although there are those who would prefer to see little or no involvement by the federal courts in death penalty cases that originate in the states, I do not share this view. Even if this view was once defensible, *Furman*, *Gregg*, and their Eighth Amendment progeny have made it impossible to completely extricate the federal courts from the death penalty arena. It is unreasonable to place the burden of protecting these special federal rights exclusively on the state appellate courts.

Since the mid-1970s, the Supreme Court has used the Eighth Amendment to construct for death penalty cases a substantive and procedural jurisprudence more elaborate and confusing than almost any other area of constitutional law.⁶³ Like habeas law, it changes rapidly; each Term the Court hands down several, and sometimes even a dozen or more, Eighth Amendment death penalty decisions.⁶⁴ Sometimes, as is true in two important areas of Eighth Amendment law today, a majority of the Court cannot agree on the proper decision-making theory, let alone on the merits.⁶⁵

62. See *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

63. See *Walton v. Arizona*, 110 S. Ct. 3047, 3058-68 (1990) (Scalia, J., concurring in part and concurring in the judgment) (discussing at length the confusion engendered by the Court's ongoing attempts to reconcile *Gregg* and *Lockett*); Mello & Duffy, *supra* note 23, at 487 (discussing the "complexity and changing standards governing substantive capital punishment doctrine. The Supreme Court's ambivalence over the death penalty has resulted in murky standards and an inability to predict with any precision where the Court will go next").

64. In the 1991 Term, for instance, the Court decided seven capital cases: *Medina v. California*, 112 S. Ct. 2572 (1992) (constitutional legitimacy of presumption of competence); *Sawyer v. Whitley*, 112 S. Ct. 2514 (1992) (application of "fundamental miscarriage of justice" exception to death penalty eligibility); *Morgan v. Illinois*, 112 S. Ct. 2222 (1992) (exclusion of juror who would automatically impose death penalty upon conviction); *Sochor v. Florida*, 112 S. Ct. 2114 (1992) (state appellate review of capital cases; use of harmless error in capital cases; "especially heinous, atrocious, or cruel" aggravating circumstance); *Riggins v. Nevada*, 112 S. Ct. 1810 (1992) (use of involuntary medication on capital defendant); *Stringer v. Black*, 112 S. Ct. 1130 (1992) (retroactivity of rule that "especially heinous, atrocious, or cruel" aggravating circumstance must be narrowed); and *Dawson v. Delaware*, 112 S. Ct. 1093 (1992) (use of evidence of gang membership during capital sentencing hearing).

65. See *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991) (noncapital Eighth Amendment pro-

The existence of this vast, complex, and changing body of federal law, for the most part applicable only to death penalty cases,⁶⁶ suggests a special need for expertise not met by most state courts. Except in those few states such as Texas and Florida where capital cases are numerous, state appellate courts do not have the opportunity to review enough capital cases to keep up with the ongoing development of the Court's Eighth Amendment jurisprudence.⁶⁷ Furthermore, Eighth Amendment doctrine certainly is not an area where the state courts should dabble. The available empirical evidence strongly suggests that such efforts lead to an exceptionally high rate of constitutional error.⁶⁸

Federal habeas opponents might contend it is the availability of expansive habeas review in the federal courts that has made possible the development of this complex body of Eighth Amendment law. They might argue that the elimination or restriction of habeas would lead to the gradual relaxation of these federal constitutional standards, thus giving states more room to experiment with their death penalty systems.

There are two problems with this argument. First, the administration of the death penalty is one area in which federalism—the freedom of states to chart separate courses—is not desirable. Despite different moral views about the death penalty, most people certainly would agree it is a unique punishment worthy of the utmost care in its administration. Once a state has decided to institute the death penalty, its death penalty system should conform to *national* standards of justice and fairness, rather than to standards that vary widely from state to state. When a state or locality decides how to punish drunk drivers, or regulates the location of toxic waste dumps, or sets the length of public school calendars, it is largely a matter of local interest. But when a state deals in death, it is a matter of national interest; certainly the media, at least so far, treat it as such. This is perhaps

portionality case); *Walton v. Arizona*, 110 S. Ct. 3047 (1990). These confused, and confusing, opinions represent the counterargument to Professor Bonnie's optimistic claim that the Supreme Court has finally gotten its act together on Eighth Amendment law and we will now see greater consistency in the Court's Eighth Amendment precedents. See Bonnie, *supra* note 9, at 103-04.

66. The Court generally has rested its death penalty jurisprudence on the Eighth Amendment, not on the Due Process Clause, which has permitted the Court to limit the application of this jurisprudence to death penalty cases. See, e.g., *Booth v. Maryland*, 482 U.S. 496, 507 n.10 (1987), *rev'd in part*, *Payne v. Tennessee*, 111 S. Ct. 2597 (1991).

67. It is important to remember state judges must continue to apply all the standard state and federal criminal procedural law in death penalty cases, in addition to the special law that has been created for such cases under the Eighth Amendment.

68. In fact, Professor James Liebman has determined that, between 1976 and 1985, the overall success rate for death penalty petitioners in federal habeas proceedings was 49%. See LIEBMAN, *supra* note 7, at 23-24 n.97.

one reason the current Supreme Court, although generally supportive of federalism, continues to grant certiorari in many state death penalty cases—and often rules for the defendant.⁶⁹ This is just one way in which “death is different.”⁷⁰

The second problem with the federalism argument is that it suggests the primary goal of federal habeas reform is to alter the substantive and procedural law of the Eighth Amendment. If this is the goal, then it should be pursued directly. The Supreme Court has the power to rectify the problem by reconsidering its Eighth Amendment precedents if they conflict with notions of federalism. Justice Scalia has suggested, on more than one occasion, that the Court do exactly that.⁷¹

However, until the Court chooses to overturn its Eighth Amendment precedents—which, as a general rule, it has not⁷²—and as long as the state courts are given the first chance to apply such federal law to state capital cases—which, as a general rule, they are⁷³—it should be acceptable for federal habeas courts to also have the power to step in and enforce prevailing Eighth Amendment standards. If state courts can enforce federal laws just as well as federal courts—as some have argued about the Fourth Amendment⁷⁴—then that is a persuasive argument for narrowing the habeas jurisdiction of the federal courts. But if the argument is that the federal law itself is flawed, then it is the federal law and not the enforcing mechanism that should be changed. It is hypocritical for the Court to allow the existing body of Eighth Amendment law to remain unchanged, yet at the

69. In the 1991 Term, the Court ruled for the defendant in five of the seven death penalty cases it decided: *Morgan v. Illinois*, 112 S. Ct. 2222 (1992); *Sochor v. Florida*, 112 S. Ct. 2114 (1992); *Stringer v. Black*, 112 S. Ct. 1130 (1992); *Dawson v. Delaware*, 112 S. Ct. 1093 (1992); and *Riggins v. Nevada*, 112 S. Ct. 1810 (1992).

70. See *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

71. See *Harmelin v. Michigan*, 111 S. Ct. 2680, 2696 (1991) (plurality opinion of Scalia, J.) (suggesting that Court overrule *Solem v. Helm* and reject notion of proportionality analysis under Eighth Amendment); *Walton v. Arizona*, 110 S. Ct. 3047, 3058 (1990) (Scalia, J., concurring in part and concurring in the judgment) (suggesting that Court overrule *Lockett*).

72. Despite Justice Scalia's suggestions in *Walton* and *Harmelin*, *Lockett* and *Solem v. Helm* still survive as valid Court precedents.

73. Even without an exhaustion doctrine in federal habeas, the state courts usually will get the first crack at resolving most federal constitutional claims at the trial and direct appeal stages of the case; a defendant who deliberately bypasses the state courts runs the risk of procedural default, even under the standard established in *Fay v. Noia*.

74. See *Stone v. Powell*, 428 U.S. 465, 493-94 n.35 (1976)

[W]e are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. . . . [T]he argument that federal judges are more expert in applying federal constitutional law is especially unpersuasive in the context of search-and-seizure claims, since they are dealt with on a daily basis by trial level judges in both systems.

same time emasculate it by eliminating one of the best means by which it can be consistently and uniformly enforced.

Both the special need for expertise in an area of federal constitutional law that is unusually complex and still changing and the importance of setting and enforcing national standards of justice and fairness in the administration of the death penalty require that federal habeas play a major role in death penalty cases. Whatever we think about the role of habeas in the American criminal justice system in general, there is no doubt that in the special context of capital cases, the benefits of habeas outweigh its inherent impact on federalism.

2. Death row inmates should be provided with competent and experienced defense counsel in federal habeas proceedings.

This principle should go without saying. Although there is no federal constitutional right to counsel in habeas proceedings,⁷⁵ Congress, by statute, has provided for such a right.⁷⁶ The statute guarantees that habeas petitioners in capital cases will be represented by at least one defense lawyer who has been a member of the bar for five years and has three years of felony criminal litigation experience.⁷⁷ Currently, this is one of the few aspects of federal habeas review of death penalty cases on which almost everybody agrees.⁷⁸ This right to counsel certainly should be retained in any future revisions of federal habeas corpus in capital cases.

3. Federal habeas review in death penalty cases should generally be based on the federal constitutional standards that existed at the time of the relevant state proceedings, including any new standards that had been "reasonably foreshadowed" at the time of the relevant state proceedings.

As I have written previously,⁷⁹ the Supreme Court in 1989 took a significant step in the right direction when it concluded in *Teague v.*

75. See *Murray v. Giarratano*, 492 U.S. 1 (1989).

76. See Anti-Drug Abuse Amendments Act of 1988, 21 U.S.C. § 848(q)(1992). But see Mello & Duffy, *supra* note 23, at 481 (suggesting that, despite statutory language that seems to create general right to federal habeas counsel in all capital cases, courts may instead choose to interpret statute to apply only to federal death penalty cases authorized by Act).

77. See Anti-Drug Abuse Amendments Act of 1988, 21 U.S.C. § 848(q)(1992).

78. For example, Professor Liebman notes in his treatise on federal habeas corpus law that courts generally appointed counsel for indigent and legally unsophisticated prisoners in capital cases, even before the enactment of the Anti-Drug Abuse Amendments Act of 1988. See LIEBMAN, *supra* note 7, at 170.

79. See Joseph L. Hoffmann, *Retroactivity and the Great Writ: How Congress Should Respond to Teague v. Lane*, 1990 B.Y.U. L. REV. 183.

*Lane*⁸⁰ that federal habeas review of state convictions generally should be based on the federal constitutional standards that existed at the time of the original state proceedings. Although this proposition is not self-evident, either as a matter of jurisprudence or federal habeas theory, it reflects a proper allocation of the scarce resource of federal habeas review. Under *Teague*, those state prisoners with the strongest claims for relief—because their convictions involved violations of federal constitutional rules that either were or should have been known by the state courts—are given the chance to obtain it. Those prisoners with the weakest claims—because their convictions conformed to the then-existing federal law—are excluded.⁸¹

Unfortunately, just one year after *Teague*, the Court ruled in *Butler v. McKellar*⁸² that federal habeas relief also is unavailable whenever state courts based their decisions on a reasonable, good faith, although ultimately erroneous, interpretation of existing federal law. In my two earlier articles, I explained why the Court's definition of "new law" in *Butler* is inconsistent with the proper role of a conscientious state judge in interpreting federal constitutional precedents.⁸³ I proposed a new definition, based on Justice Harlan's view that state judges should be expected to act in "conceptual faithfulness" to federal precedents.⁸⁴

I continue to believe that *Butler* goes too far in restricting federal habeas review of state convictions and thus removes a major incentive for state judges to "toe the constitutional mark."⁸⁵ What is needed is a substitute standard for new law that clearly outlines what a conscientious state judge should do when faced with unclear federal constitutional law. Perhaps the best such standard I have seen is the one developed by Professor Larry Kramer. He argues that conscientious state judges not only must follow relatively clear Supreme Court precedents, but also must decide whatever new federal constitutional standards are "reasonably foreshadowed" by the Court's decisions.⁸⁶

80. 489 U.S. 288 (1989).

81. See Hoffmann, *supra* note 79, at 206-09.

82. 494 U.S. 407 (1990).

83. See Hoffmann, *supra* note 5, at 180-84 (pre-*Butler* analysis of predicted "reasonable good faith" standard for "new law"); Hoffmann, *supra* note 79, at 210-13 (post-*Butler* analysis).

84. See Hoffmann, *supra* note 79, at 215-17 (drawing proposed statutory language from Justice Harlan's opinion in *Desist v. United States*, 394 U.S. 244 (1969)).

85. This now-familiar language first appeared in Justice Harlan's opinion in *Mackey v. United States*, 401 U.S. 667, 687 (1971) (Harlan, J., dissenting in one judgment and concurring in the judgment of the other two cases).

86. LARRY KRAMER, REPORT TO THE FEDERAL COURTS STUDY COMMITTEE, SUBCOMMITTEE ON THE ROLE OF THE FEDERAL COURTS AND THEIR RELATION TO THE STATE COURTS (1989). This "reasonably foreshadowed" standard lies somewhere between the *Butler* "reasonable good faith" standard, under which virtually every Court decision is new law, and the old, pre-*Teague* "clean break with the past" standard, under which virtually no new Court decision was new law.

If the state courts fulfill their constitutional responsibilities under such a "reasonably foreshadowed" standard for new law, then we generally should leave their decisions undisturbed, except for the kinds of rare situations in which the Court acknowledged that *Teague* itself would not apply.⁸⁷ Even in death penalty cases, finality is important. If a capital trial, including the sentencing hearing, conformed to the existing federal law, and no subsequent changes in the law have affected the trial's fundamental fairness,⁸⁸ we should feel no moral obligation to retry the case even if different law prevails today.

4. Federal habeas courts reviewing death penalty cases generally should defer to state court findings on issues of historical fact, but not on legal issues or mixed issues of law and fact.

I agree with both the Court and Congress⁸⁹ that federal habeas courts generally should not be a forum for relitigation of issues of pure historical fact that already have been determined by the state courts. This is an area in which the state courts—especially the trial courts—have a significant advantage over federal habeas courts: namely, the superior opportunity to see and hear the witnesses. Even if the habeas court decides to order an evidentiary hearing, it will not be able to do so until much later, when witnesses may have died or memories may have lapsed.

87. In *Teague*, Justice O'Connor discussed two exceptions to the general rule of nonretroactive application of "new law" to habeas cases. The first exception is for new rules that place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Teague v. Lane*, 489 U.S. 288, 311 (1989) (quoting *Mackey v. United States*, 401 U.S. 667, 692 (1971)). This exception would apply to rules such as the one holding flag burning to be protected speech under the First Amendment. See *Texas v. Johnson*, 491 U.S. 397 (1989). The second exception is for new rules "without which the likelihood of an accurate conviction is seriously diminished." *Teague*, 489 U.S. at 313. This exception would apply to rules such as the one barring a prosecutor's knowing use of perjured testimony. See *Rose v. Lundy*, 455 U.S. 509, 544 (1982) (Stevens, J., dissenting).

I have argued for a broader interpretation of the second exception that would include all new rules that are "implicit in the concept of ordered liberty," or are an inherent component of "fundamental fairness." See Hoffmann, *supra* note 79, at 213-14. I also have argued for the addition of two new exceptions. The first would be for claims that are capable of repetition yet might evade federal habeas review, such as ineffective assistance of state appellate counsel. See Hoffmann, *supra* note 79, at 214-15. The second, originally proposed by Ellen E. Boshkoff, would be for individual cases in which retroactive application of new law could avoid a miscarriage of justice, for example, the confinement of an innocent person. See Ellen E. Boshkoff, *Resolving Retroactivity After Teague v. Lane*, 65 IND. L.J. 651 (1990).

88. I am using here the term "fundamental fairness" to capture what I believe to be the preferable, broader scope of the Court's second *Teague* exception. See *supra* note 87.

89. See *Sumner v. Mata I*, 449 U.S. 539 (1981), *vacated*, *Sumner v. Mata II*, 455 U.S. 591 (1982); *Townsend v. Sain*, 372 U.S. 293 (1963), *rev'd*, *Keeney v. Tamayo-Reyes*, 112 S. Ct. 1715 (1992); 28 U.S.C. § 2254(d) (1977).

There is no similarly good reason for federal habeas courts to defer to prior state court determinations of mixed issues of law and fact.⁹⁰ In *Wright v. West* the primary argument in favor of deference on mixed questions of law and fact was that such deference is already paid to state court determinations of factual questions under 28 U.S.C. § 2254(d)(1977) and *Townsend v. Sain*, and to state court determinations of legal questions under *Teague* and *Butler*. Thus, or so the argument went, it only makes sense to extend the same kind of deference to state court determinations of the mixed category of questions. This argument, however, is not persuasive.

First, habeas courts should not be required to defer substantially to prior state court interpretations of federal law. If the federal law was clear at the time of the original state proceedings, then under *Teague* the state court must either get it right or be reversed. If the federal law was unclear, then the better view (despite the Court's decision in *Butler*) is that either the state court must have correctly decided what new rules the existing case law "reasonably foreshadowed" or that the state court was wrong and should be reversed. Putting the two together, the only appropriate deference that should be paid to a state court by a habeas court is not to reverse on an issue of federal law if it would have been unreasonable to expect a conscientious state court to correctly decide the issue. This is not much deference. It follows that habeas courts do not need to defer to the state courts on mixed issues of law and fact. Both the federal law and the federal law's

90. This is one of the two issues on which the Court granted certiorari in *Wright v. West*, 112 S. Ct. 2482 (1992). The other question in *Wright* involved the application of the standard for constitutional insufficiency of the evidence under *Jackson v. Virginia*, 443 U.S. 307 (1979).

On June 19, 1992, the Court handed down its decision reversing the Fourth Circuit Court of Appeals and sustaining the conviction in *Wright*. See *Wright*, 112 S. Ct. 2482. However, the Court did so on grounds that *Jackson* was not violated, and did not reach the habeas standard of review issue. Justice Thomas' opinion (joined by Chief Justice Rehnquist and Justice Scalia) suggested that *Teague* had altered the traditional habeas standard of review and hinted that some degree of deference to state court application of the law to facts might be appropriate. Justice O'Connor (joined by Justices Stevens and Blackmun) concurred in the judgment, but disagreed with Thomas' analysis of *Teague's* effect on the habeas standard of review issue. According to O'Connor, *Teague* was a case about new law and not a case about deference to state courts. Justice Kennedy, in a separate concurrence, agreed *Teague* was not about deference, but he declined to state any position on the habeas standard of review issue. Justice Souter thought the case was governed by *Teague*, as a request for new law, and that the Court should not have reached the *Jackson* issue. Finally, Justice White simply found *Jackson* inapplicable, and did not say anything about the habeas standard of review issue.

In light of the fragmented Court in *Wright*, it seems obvious that we will have to wait until next term's decision in *Withrow v. Williams*, cert. granted, 112 S. Ct. 1664 (1992) (No. 91-1030), to find out whether the Court really believes that *Teague* affected the proper standard of review for mixed questions of law and fact previously decided by the state courts.

application to the historical facts of the particular case should be open to reexamination on habeas review.

Second, even under the Supreme Court's overly deferential standard for new law in *Butler* such deference should not extend to mixed issues of law and fact.⁹¹ The reason for deferring to the state courts on legal issues is inapplicable to mixed issues.⁹² The deference on legal issues, under *Teague* and *Butler*, is based on a "contributory fault" analysis: it is unfair to blame the state courts for, or attempt to deter them from, errors that were not their fault.⁹³ This is not true, however, with mixed issues; there can be no "contributory fault" on the part of the federal courts because they have no responsibility for applying the federal law to the facts of particular state cases. With mixed issues, assuming the federal law is clear, it is appropriate to expect the state courts to figure out how to apply that federal law to specific facts. If the state courts get it wrong, they should be reversed.⁹⁴

However, the point may be moot. In death penalty cases, the pressure felt by federal habeas courts to "do the right thing" usually is so great they will be able to find a way, regardless of the deferential standard used, to reverse state court decisions with which they disagree. For example, even under a "full and fair opportunity" stan-

91. The Court in *Wright* did not find it necessary to address this argument. See *Wright*, 112 S. Ct. 2482.

92. In *Wright* those justices who wrote about the habeas standard of review issue chose to focus primarily on the question whether *Teague* was about deference or simply about the retroactive application of new law. *Id.* I find this to be a distinction without a difference. Whether one characterizes *Teague* as a case about deference or not, the bottom line is the same—if the state courts act reasonably under the federal precedents available to them at the time of their decisions, then those decisions will stand. If not, then they will fall. Either way, the important question in *Wright* was whether or not to extend *Teague*'s version of deference (or whatever) to another context—that of mixed issues of law and fact. This question, in turn, required a reexamination of the reasons in support of *Teague*, to see whether those reasons also applied to the so-called mixed issues.

93. See, e.g., *Teague v. Lane*, 489 U.S. 288, 310 (1989) ("state courts cannot 'anticipate, and so comply with, this Court's due process requirements or ascertain any standards to which this Court will adhere in prescribing them'") (quoting *Brown v. Allen*, 344 U.S. 443, 534 (1953) (Jackson, J., concurring in the result)).

94. Another reason not to defer to prior state court resolution of mixed questions is that it is in this mixed category where one would most expect to find the rare instances of deliberate state court resistance to federal authority. If a state court disagrees with a Supreme Court decision and decides to subvert its enforcement, the court likely will do so *not* by mischaracterizing the facts of the case before it (since facts are developed in open court with witnesses present) or by misstating the Supreme Court's rule (since such a misstatement obviously will subject the state court to reversal by a federal habeas court). Rather, the court likely will misapply the unpopular rule to the facts of the particular case. If federal habeas courts are required to defer to state court applications of law to facts, then such deliberate defiance of federal authority will be effectively shielded from review.

dard,⁹⁵ a federal habeas court might hold that an erroneous understanding or misapplication of Eighth Amendment law worked to deprive the petitioner of a "full and fair opportunity" for adjudication in the state courts. Death penalty cases may be one category of cases in which deference works better in theory than in practice.

5. Federal habeas courts generally should reach the merits of all federal claims raised in a timely petition: a procedural default in the state courts should not bar federal habeas relief, except for cases involving a defendant's deliberate bypass of the state courts.

This is a controversial proposal in the current anti-habeas climate, although it derives from the same theoretical source as the Supreme Court's decision in *Teague*. In *Teague* the Court viewed habeas primarily as an effective tool for influencing the behavior of state judges.⁹⁶ But if habeas can influence state judges, it can influence state legislatures as well. And, in the context of death penalty cases, what better way is there to use this tool than to force the states to improve the quality of capital trials? Both state legislatures and state judges have the ability to do so, given the proper incentive.⁹⁷

There is widespread agreement that the best, and perhaps the only, way to significantly improve the quality of capital trials is to provide better trial lawyers for capital defendants.⁹⁸ Unfortunately, state legislatures and judges generally control, either directly or indirectly, the mechanisms for qualification, appointment, and compensation of de-

95. This is the most deferential standard currently under consideration in the Court and Congress; it was contained in the Senate's version of the pending crime bill, see *supra* note 20, and currently is before the Court in the pending case of *Withrow v. Williams*, cert. granted, 112 S. Ct. 1664 (1992) (No. 91-1030) (should federal habeas courts be precluded from reviewing *Miranda* claim if petitioner had "full and fair opportunity" to raise such claim in the state courts?).

96. See *Teague*, 489 U.S. at 306 ("the threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards") (quoting *Desist v. United States*, 394 U.S. 244, 262-263 (1969)).

97. This important point has been made previously by Professor Bonnie. See Bonnie, *supra* note 9, at 112-13 ("state judicial systems have the power to facilitate consideration of all potential constitutional issues at trial through improved defense representation, through the use of checklists, and through active participation by the trial judge in monitoring compliance with constitutional requirements").

98. See Bonnie, *supra* note 9, at 107-08 ("Improved trial representation will promote just outcomes and will simplify collateral review."); Geimer, *supra* note 10, at 278 ("The damage posed by these areas of bad law can be minimized only by better trial advocacy."). For two accounts detailing the deficiencies of defense trial lawyers in capital cases, see Vivian Berger, *The Chiropractor as Brain Surgeon: Defense Lawyering in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 245 (1990-91), and Ronald Tabak, *Gideon v. Wainwright in Death Penalty Cases*, 10 PACE L. REV. 407, 407-09 (1990).

fense trial lawyers. In many states the legislatures and judges do not seem to care very much about this problem.⁹⁹

Absent direct federal intervention and funding, the best way to fight the problem of inadequate defense trial lawyering is to have the federal government provide an incentive for the states to act. One way to do this is to eliminate the procedural default doctrine of *Wainwright v. Sykes*¹⁰⁰ and require federal habeas courts in capital cases to consider the merits of all federal claims, even when the claims have been procedurally defaulted in the state courts, unless the defendant deliberately bypassed the state courts in violation of *Fay v. Noia*. This means state prosecutors will never be advantaged by, but will often suffer from, the inadequacies of a defendant's trial lawyer. If the procedural default doctrine were eliminated in capital cases, state prosecutors likely would begin pressuring their state legislatures and judges to ensure that capital defendants receive better trial lawyers. The combination of the prosecution and defense lobbies likely would be more successful than has the defense lobby alone.

A second important effect of this proposal would be to provide state trial judges an additional incentive to intervene to protect a capital defendant's federal constitutional rights. Presently, a state trial judge may, but often need not, act to protect a defendant's rights without the defendant's lawyer first making a valid request for such action. If the judge knows, however, that even a procedurally defaulted federal claim will lead to habeas relief and an eventual retrial of the case, the judge will be much more likely to act *sua sponte* on the defendant's behalf. This kind of judicial intervention would provide additional insurance in those situations where even a competent defense trial lawyer might fail to recognize the need to raise an issue.

We should eliminate procedural default in capital cases even if these incentives are less than completely successful in improving the quality of defense trial lawyering. A person who faces execution deserves one legitimate opportunity to have a federal habeas court review the merits of all of his federal claims. The defendant should not have to forfeit this opportunity because of the mistakes, strategic or otherwise, of his trial lawyer.¹⁰¹ The procedural default doctrine of

99. See Berger, *supra* note 98, at 249 ("prevailing hourly rates and maxima may result in assigned counsel's receiving as little as \$1,000 per case"); Tabak, *supra* note 98, at 407 ("[S]tate legislatures and local counties generally do not adequately fund defense lawyers to represent death row inmates.").

100. 433 U.S. 72 (1977).

101. Compare Bonnie, *supra* note 9, at 109-113 with John C. Jeffries & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679, 719-21 (1990) (proposing that federal habeas courts reach the merits of procedurally defaulted claims that implicate reliability of conviction or sentence).

Wainwright may strike a proper balance between fairness and federalism in noncapital cases, but the balance needs to be rethought in the special context of capital cases. If we can limit habeas review in capital cases to one petition only, and if we can put reasonable time limits on the filing of that one petition, then it seems to me we can afford to review all of the petitioner's federal claims on the merits.

6. *Federal habeas courts reviewing death penalty cases should not require prior exhaustion of all available state remedies.*

Exhaustion of available state remedies currently is a statutory prerequisite to habeas relief, thus ensuring that state courts have the chance to rule on the merits of all federal constitutional claims before they are brought to the federal courts.¹⁰² If a federal habeas petition contains even one unexhausted claim, the habeas court must dismiss the entire petition,¹⁰³ unless the State waives the exhaustion defense and the habeas court decides to accept the waiver.¹⁰⁴

In capital cases, the exhaustion requirement simply delays the final disposition of the merits of the habeas petition. If an execution date has already been set, this delay often operates to the State's detriment, since the habeas court may be forced to grant a stay of execution pending completion of the relevant state proceedings. This is why the State opts to waive the exhaustion requirement in many capital cases.

There is little to be lost, in terms of federalism and comity, and much to be gained, in terms of efficiency, by simply eliminating the exhaustion requirement in capital cases. If a prisoner prefers to bypass available state remedies and move from the direct appeal straight to the federal habeas court, then it is hard to see why the defendant should be prevented from doing so. The only significant practical effect would be that the habeas court will have the first chance to develop and find the facts relating to such traditional post-trial claims as ineffective assistance of counsel. Additionally, the habeas court might be more sensitive to such claims than the state courts. This effect, however, might prove salutary: like the previous proposal to abolish procedural default, the elimination of the exhaustion requirement may help to push the states even further in improving the quality of defense trial counsel. If the states know a habeas court, and not a more sympathetic state court, will initially determine the facts relat-

102. 28 U.S.C. § 2254(b), (c) (1977).

103. See *Rose v. Lundy*, 455 U.S. 509 (1982).

104. See *Granberry v. Greer*, 481 U.S. 129 (1987).

ing to the effectiveness of a defense trial lawyer, then perhaps the states will begin to pay more attention to the competence and experience of such counsel.

7. *There generally should be one federal habeas review of a death penalty case; a second or subsequent federal habeas petition should be permitted only if there is applicable new law.*

Although federal habeas courts have an important role to play in death penalty cases, this does not require multiple opportunities for habeas review. To a significant extent, this principle flows directly from *Teague*.¹⁰⁵ If habeas courts generally are limited to reviewing a prisoner's conviction and sentence under the federal law that existed at the time of the original trial, there is no good reason to grant multiple opportunities for habeas review of the same capital trial; all subsequent habeas courts would base their decisions on the same federal law and facts as the first habeas court, and thus presumably would reach the same result. The exception to this general limitation is in those unusual situations where *Teague* does not apply: if new law applies retroactively to old habeas cases, then relitigation of the relevant legal issue by means of a new habeas petition must be permitted.

8. *There should be reasonable time limits on the availability of federal habeas review in death penalty cases.*

One of the most serious problems in death penalty litigation is the flurry of legal activity that often occurs in the few days before a prisoner's scheduled execution.¹⁰⁶ At a time when the prisoner should have the chance to come to terms with his fate and prepare for his impending death,¹⁰⁷ he is instead occupied by a whirlwind of motions for stays of execution, appeals, and certiorari petitions in both the state and federal courts, along with requests for executive clemency. If the prisoner prevails, all returns to normal, or at least as normal as life can be in prison. If the defendant does not prevail, the execution proceeds, whether the prisoner is mentally prepared or not.

Some prisoners must actually undergo this nerve-wracking, last-minute process several times: the State sometimes sets a first, then a second, and even a third or a fourth execution date for the same pris-

105. 489 U.S. 288 (1989).

106. See *supra* note 58.

107. See *Ford v. Wainwright*, 477 U.S. 399, 407, 409 (1986) (discussing strong societal belief, both historical and modern, that it is important for death row inmate facing execution to be able to "come to grips with his own conscience or deity").

oner. As explained, the first few execution dates are often set *not* for the purpose of actually executing the prisoner, but to force the prisoner to use up his federal claims by filing habeas petitions and seeking stays of execution.¹⁰⁸ Nor is the State wrong to believe setting such fictitious execution dates is an essential part of the operation of the death penalty system. In the absence of a time limit on the filing of habeas petitions, setting such execution dates probably is the only effective way a state can force a death row inmate to file a habeas petition, test his conviction and sentence, and move his case one step further down the long road toward its ultimate conclusion.

The last-minute flurry of legal activity in death penalty cases is problematic for two reasons. First, it contributes to poor judicial decision making. When a federal habeas court must decide to grant or deny a request for habeas relief or a stay of execution within a matter of hours or minutes, the decision probably will not receive the kind of careful, deliberate reflection it warrants. While fax machines, modems, and computers reduce the magnitude of this problem for federal habeas courts, it is still a problem. Regardless of the outcome, this rush to judgment cannot leave anyone feeling good about the process. We should adopt an alternative process where the same issues are raised and the same degree of judicial scrutiny is provided, but in which judges are able to act in a manner that is more conducive to reflective decision making.

The second problem with this last-minute legal activity is that it is unfair, if not inhumane, to the prisoner.¹⁰⁹ Of course, if asked, most prisoners on death row would undoubtedly grasp at any straw in an attempt to avoid execution, including the possibility of a last-minute stay. But this does not make the present situation either inevitable or tolerable. For the prisoner's own good, in preparing for his fate, we should have a system where the prisoner knows that fate sooner than a few minutes before his execution.

Reasonable time limits should be imposed on the availability of federal habeas review in death penalty cases in order to avoid these problems. To avoid fictitious execution dates, and the rushed decisions they compel, a capital inmate should be required to file his first, and generally only, habeas petition within one year after the completion of the direct appeal process, or within one year after a competent

108. See *supra* text accompanying notes 60-61.

109. In the Jens Soering case, for example, the European Court of Justice concluded Virginia's death row violated European human rights standards, based in large part on the adverse psychological effects on a prisoner of awaiting a pending execution. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser A) (1989), reprinted in 11 Eur. Hum. Rts. Rep. 439 (1989), 28 ILM 1063 (1989).

and experienced habeas lawyer has been appointed to represent him in the habeas court, whichever comes later. This one-year limit is a reasonable amount of time for the defendant and his habeas lawyer to review the record of the state proceedings and to develop any arguments that might be made on the basis of the then-existing federal law.¹¹⁰ If more time is required because of a need to obtain a new habeas lawyer or to await a decision from a state post-conviction court (where the prisoner has elected to avail himself of such a state remedy), then the prisoner should be granted an extension of time. Under no circumstances should the state be allowed to set an execution date until after the final dismissal of the inmate's first habeas petition, including a denial of certiorari by the Supreme Court.

Once an execution date has been set, and assuming the prisoner can assert some legitimate colorable ground for relief on a second or subsequent habeas petition, the courts generally should be prohibited from granting such habeas relief—including a stay of execution—within one calendar week of the prisoner's scheduled execution. This time limit should be strictly construed and not subject to waiver or extension. If there are any new legal claims that can prevent a scheduled execution, such claims should be raised before the last week, or not at all. If habeas courts feel the need to grant a stay of execution in order to fully deliberate on the merits of a habeas petition, they should do so before the last week. We should not indulge our understandable concerns about the finality of the death penalty by hearing a prisoner's claims up until the very moment the prisoner is executed. This kind of indulgence has the potential to contribute greatly to the uncertainty that can make a death row inmate's last hours of life unnecessarily torturous, while providing no ultimate relief, as in the case of Robert Alton Harris.

If, as suggested, habeas courts are strictly prohibited from granting relief—including a stay of execution—within one week of a scheduled execution, then all participants in the habeas process will soon come to view the one-week deadline as the true point of finality and the flurry of legal activity will occur before then. This will give the unsuccessful prisoner a full week to prepare for his impending death. Perhaps then the prisoner's execution will be carried out with the solemnity and dignity such a momentous act deserves, rather than as the prize in the ultimate judicial tug-of-war.

110. *But see* Mello & Duffy, *supra* note 23, at 479 (arguing that *any* time limit on filing federal habeas petitions should be viewed as both unrealistic and unconstitutional).

9. *Regardless of any limits on the number and timing of federal habeas petitions, federal habeas courts in capital cases should be available to hear any colorable claim of innocence, or of legal ineligibility for the death penalty, if the claim is based on new evidence that was not, and could not reasonably have been, presented to a prior habeas court.*

This principle, whose general validity under current habeas law is pending before the Supreme Court,¹¹¹ may be the most important of all the principles in this Article.¹¹² The specter of the execution of an innocent person, or the execution of a person who is not legally eligible for the death penalty, should haunt both supporters and opponents of capital punishment. For opponents, it is often one of the main reasons to seek abolition of the death penalty. For supporters, it would be the single event most likely to cause a dramatic shift in public opinion against the death penalty. It could even lead to the abolition of capital punishment altogether.¹¹³

The thought of an innocent or legally ineligible prisoner being put to death at the hands of the State is so offensive to basic notions of fairness and justice that federal habeas courts should be available to hear any colorable claims of innocence or legal ineligibility for the death penalty that are based on new evidence that was not, and could not reasonably have been, presented to a prior habeas court. Given the scrutiny provided by the state courts in capital cases, and the availability of one meaningful federal habeas review, it will be an extremely rare case in which an inmate will be able to make the kind of showing necessary to gain this extraordinary relief. But we should never say never, despite the potential costs of entertaining such rare fact-based claims.

111. See *Herrera v. Collins*, cert. granted, 112 S. Ct. 1074 (1992).

112. This principle, in one form or another, has previously been advocated by, among others, Professors Eric Freedman and Bruce Ledewitz. See Eric M. Freedman, *Innocence, Federalism, and the Capital Jury: Two Legislative Proposals for Evaluating Post-Trial Evidence of Innocence in Death Penalty Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 315 (1990-91); Bruce Ledewitz, *Habeas Corpus as a Safety Valve for Innocence*, 18 N.Y.U. REV. L. & SOC. CHANGE 415 (1990-91).

113. This was, in fact, the experience with capital punishment in England during the 1950s. One of the three celebrated death penalty cases that led to the abolition of capital punishment in England in 1957 was the Evans case, in which Timothy John Evans was hanged in 1950 for murder. Three years after Evans's execution, John Halliday Christie confessed to the same murder, as well as to six others in which the bodies were found in the same place as Evans's alleged victim. Christie was hanged for murder in 1953. A government inquiry concluded that Christie lied about his involvement in the murder for which Evans was executed, but the public and the media remained unconvinced. The Evans case was cited frequently by the abolitionists in the House of Commons during the subsequent debate over the future of capital punishment in England. See JAMES B. CRISTOPH, *CAPITAL PUNISHMENT AND BRITISH POLITICS* 100-05 (1962).

IV. CONCLUSION

The special federal habeas review I have described, specifically designed for death penalty cases, is a far cry from what has been proposed to date by both the liberals and the conservatives in the habeas area, and I may be criticized by both sides of the habeas debate. I believe, however, that the creation of a new federal habeas review system, applicable to capital cases only, and based on the above principles, would contribute greatly to the development of an overall death penalty system that is much more fair and just, yet also much more efficient, than our present system.

In any event, what is most important is that we begin to engage in a renewed dialogue about the future of habeas review of death penalty cases. The old era of federal habeas is ending, and a new era is about to begin. We must go beyond the usual attempts to respond in a piecemeal fashion to what the Supreme Court and Congress are doing. We must return to the basics in our attempt to shape the new era of federal habeas. It is time to start from scratch.